Supreme Court, U.S.
FILED
(1) 971450 MAR - 3 1998
OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

IN RE: MARGARET AND HERBERT CARLSON,

Debtors.

HERBERT AND MARGARET CARLSON,

Petitioners,

v.

THE UNITED STATES OF AMERICA
(Treasury Department,
Internal Revenue Service),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTIONS PRESENTED

1. Whether interest and penalties on income taxes are mandatory where, as here, tax-payers experience sudden and unexpected cash flow problems due to the medical expenses of their disabled son?

2. Whether interest and penalties on income taxes can be mandatory when such additions to taxes are not constitutionally authorized, and there are exceptions for the abatement of penalties and/or interest in certain unusual cases.

3. Whether the Internal Revenue Service is bound by its own guidelines?

4. Whether the IRS has the ultimate burden of proof to establish its claim? [There is a conflict between circuits].

5. Whether the unrebutted testimony of Petitioner's witnesses at trial was sufficient, or whether Petitioners had to prove their case beyond the shadow of a doubt by documents and expert testimony?

LIST OF PARTIES

The parties to this action are as follows:

The Petitioners are Herbert P. and Margaret Carlson, 1040 N. Lake Shore Drive, Chicago, Illinois.

The Petitioners' attorney is Herbert P. Carlson, Suite 711, 100 West Monroe Street, Chicago, Illinois 60603

The Respondent is the United States of America (Treasury Department, Internal Revenue Service), Washington, D. C.

The United States is represented by Assistant Attorney General Loretta C. Argrett; and Bruce R. Ellisen and Carol Barthel, Attorneys, Tax Division, Department of Justice, P.O. Box 502, Washington, D.C. 20044. Of counsel is James Burton Burns, Illinois, Eastern Division of the Northern District, 219 S. Dearborn St., Suite 500, Chicago, IL 60604.

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OPINIONS BELOW

The September 23, 1997 opinion of the Court of Appeals for the Seventh Circuit is reported as In the Matter of Herbert P. and Margaret P. Carlson, Debtors. (Herbert P. and Margaret P. Carlson, Plaintiffs-Appellants v. The United States, Defendant-Appellee, 126 F. 3d 915 (7th Cir. 1997), and also appears at A 1 et seq.[1] A petition for rehearing with suggestion for rehearing en banc was denied on December 2, 1997. (A 39)

The District Court Opinion, rendered on July 12, 1996, is reported as In re Herbert and Margaret Carlson, Appellant v. IRS, Appellee, 198 B.R. 949 (N.D. Ill. 1996), and also appears at A 40 et seq.

The Bankruptcy Court's opinion of December 5, 1995, and modified December

[1] "A" stands for the Appendix to this Petition.

17, 1995, is reported as In re Herbert and Margaret Carlson, Debtors, 189 B.R. 454 (Bankr. N.D. Ill. 1995) and is not reproduced here because of the voluminous nature of the three opinions involved. A copy of this opinion is being supplied separately by letter pursuant to suggestion of the Technical Clerk.

JURISDICTION

The Judgment and Opinion of the Seventh Circuit Court of Appeals was entered on September 23. 1997. On November 7, 1997, Petitioners timely filed within 45 days (App. Rule 40) a Petition for Rehearing with Suggestion for Rehearing En Banc. Both were denied on December 2, 1997. (A 39) The bankruptcy court opinion was rendered on December 5, 1995 and modified on December 17, 1995; the District Court's Opinion was entered on July 12, 1996. The bankruptcy court de-

rives its jurisdiction by referral pursuant to 28 U.S.C., sec. 157. The district court derives its original jurisdiction of bankruptcy cases pursuant to 28 U.S.C., sec. 158. The Court of Appeals gains its jurisdiction under 28 U.S.C., sec. 158. This Court gains its jurisdiction under 28 U.S.C., sec. 1254(1).

STATUTES INVOLVED
[Bracketed Material Supplied]

This case involves the scope, meaning and/or construction of the following constitutional provisions, statutes, rules and guidelines, which appear in material part in Appendix 69-71 hereto:

1. Article 1, Sec. 8, 9 and Amendments V, X and XVI of the Constitution of the United States.

2. 11 U.S.C., sec 505(a)(1) [Bankruptcy power to determine legality of interest].

3. 26 U.S.C., sec. 6651(a)(2) [Restricted power of the Secretary of the Treasury to assess penalties].

4. 26 U.S.C., sec. 6654(e)(3)(A)

[equitable power to abate penalties].

5. 11 U.S.C., sec. 105(a) [bankruptcy equitable powers].

6. Internal Revenue Manual (CCH) sec. 4350 (24), par. 22.2 (3).

STATEMENT OF THE CASE

This is a case where the debtors, Herbert and Margaret Carlson, experienced unexpected and sudden cash flow problems due to the enormous medical expenses incurred by their son, an uninsured manic depressive (paranoid) schizophrenic whose medical bills totalled over $170,000 during the three-year period in question, 1990 - 1992. Ap. Op.[2] A 5, 17.

The following are corrections of some of the misstatements made by the Court of Appeals in its Opinion: (A 1 et seq.)

The Court of Appeals said at A 21:

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[2]"Ap. Op. " stands for Court of Appeals Opinion.

According to Mr. Carlson,[3][footnote supplied by Petitioner] his son was constantly on medication; was uninsured until 1993, and even now relies on the Carlsons to pay the uncovered balance of his medical expenses; was treated by more than five psychiatrists; lived with the Carlsons in the Lake Shore Drive condominium; is extremely annoying, irritating, and dangerous; physically attacked his mother and grandmother; was hospitalized twice; cannot be left alone; stole and pawned jewelry from family members; and generally made the Carlsons' lives "a 'living nightmare.'" Although the situation, if it is really as dreadful as it sounds, is sad, we do not think it constitutes the type of hardship that excuses the payment of taxes. We believe the type of illness or debilitation that might create reasonable cause is one that because of severity or timing makes it virtually impossible for the taxpayer to comply -- things like emergency hospitalization or other incapacity occurring around tax time.[4]

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[3]His unrefuted testimony at trial. [Footnote supplied by Petitioner]

[4]To this Petitioners say, as Justices Brennan, Marshall, Powell and O'Connor feared, the "bright line" drawn by this Court in United States v. Boyle, 469 U.S. 241, 253-4 may have been too bright. At bar, the IRS, supported by the Seventh Circuit, contends that there is no tax-

This view is not the one announced by this Court in United States v. Boyle, 469 U.S. 241 (1985). As noted by Justice Brennan at 469 U.S. 253, the majority of the Court has held that disability alone could well be an acceptable excuse for late filing. 469 U.S. 248, n. 6.

Nor does one quick look at the law books reveal the 7th Circuit view. To the contrary. The IRS Manual, by which the IRS contends it is not bound, states: "A cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly negatives willful neglect will be accepted as reasonable." Internal Revenue Manual, (CCH) sec. 4350 (24) par. 22.2(3), Boyle,

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payer right to penalty abatement since it is not bound by the Internal Revenue Manual relied upon by this Court at 469 U.S. 244, 254. Ap. Op. at A 19-20.

469 U.S. 241, 244, n.1 (1984).

Herbert Carlson testified as follows at the hearing of May 23, 1995 at 2:00 p.m., Tr. 101:

> Q. In addition to the financial hardship caused by these medical bills, did his condition affect your ability to come to grips with the payment of your taxes in '90, '91 and '92?
>
> A. Well, I wasn't really thinking about that . I wasn't thinking about my taxes. I mean, I was having so much problems, everything just slipped in 1990, '91 and '92 because it was a situation that was totally all consuming. It's not that I want to pay the taxes or not want to pay the taxes. I still want to pay my taxes but, it's just money that I was using, I used for other purposes, and I was also trying to keep an office and keep who I hired and paid. I was an employer supporting other people who had families.

Mr. Carlson testified plainly, unequivocally and consistently that after paying the medical bills of his disabled son, supporting his family and paying his business expenses that he had no money left to pay the IRS for the three years in

question, 1990 through 1992 (Tr. 101-110).

Mr. Carlson was 63 years old at trial, obviously nearing the end of his career and has been very severely hampered by his son's difficulties. (Tr. 94-101, 146).

Also Carlson testified that the IRS refused to work out a reasonable payment plan with him in 1994, Tr. 110:

> Q. That was Mr. Sibley's demand, 75 percent immediately?
>
> A. Yes, as I recall that's what he wanted, right.
>
> * * * *
>
> Q. Well, why didn't you just pay the 75 percent.
>
> A. Because I didn't have 75 percent of what I owed.
>
> Q. You didn't have the money?
>
> A. I didn't have the money.
>
> Q. All right. So what did you do? They wanted 75 percent.
>
> A. Well, I had no other choice. I advised Mr. Sibley and Mr. Thullen, I advised him verbally, I believe by letter that I would have no other choice but to you know, because of

> the seizure and they indicated they were going to sell the property, put it up for sale, going to advertise in the newspaper and all that sort of stuff that I would file bankruptcy, Chapter 11, and try to work out a payment plan to pay them off.

Mr. Carlson further testified that his broker advisor, Mr. Miller, told him no refinancing could be had while liens were on his home and that he, Carlson, had never heard that liens could be subordinated. (Tr. 128, 148). Miller confirmed this and further stated that he had never heard anything about subordination of government liens either. (Tr. 54-61). The Taxpayer Bill of Rights now requires the removal of such liens, and the IRS has now removed its liens. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452).

It is false to state that the IRS never knew about the Carlsons summer home in LaPorte County, Indiana, valued at

$125,000. The IRS knew at all times that the Carlsons owned real estate in Indiana, for the taxes for this property were reported on Schedule A of their tax returns since 1989. (See tax returns, trial exhibits Nos. 1-2, Schedules A and A-2). The Indiana property was listed on Petitioners' bankruptcy schedules as theirs, even though for financing purposes it had been previously transferred to their son. Bankruptcy Petition, Schedule A, R. 1-1)[5]

Mr. Carlson did not testify that he could have borrowed funds from a wealthy

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[5]When it became apparent that the IRS proposed to seize and sell Petitioners' home and that no realistic partial payment would be accepted, the petitioners were forced to abandon financing efforts and enter a Chapter 11 reorganization with the Indiana property at all times under the jurisdiction, supervision and control of the bankruptcy court. The IRS could have requested the court to lift the stay so as to seize this asset, but never did.

relative to satisfy the IRS liability. Mr. Carlson testified that his wife had a wealthy relative who he could ask about the matter, but Mr. Carlson did not know whether he would say yes or no. This speculation has no probative value.

Finally, Mr. Carlson did not ignore the IRS when it came calling. Even George Sibley, the IRS collections expert, refuted that notion. (Tr. 1-5, p. 212):

> Q. Well, one of the bases for the seizure was that the taxpayers had ignored the Internal Revenue Service, had not contacted them, talked to you about any kind of payment plan or any kind of financial statements or things of that nature; is that correct?
>
> A. No, that's not correct.
>
> Q. What's not correct about it?
>
> A. In the language that I am using that request for seizure, when I made reference to ignore, I think these are your words and not mine. What I mean is that the taxpayer has not made a sufficient response to my demand for payment, and has not provided those things that I requested, has not provided those items that

would effectively make a response from the taxpayer.

The testimony of Revenue Officer Sibley (Tr. 1-5, p. 182), Petitioners' accountant Walter Hughes (Tr. 1-3, p.31) and Herbert Carlson (Tr. 1-4, p. 101-105) reveal, there was no warning to the Carlsons of the imminent seizure of their home beyond a vague statement by Sibley in early 1993 that "enforcement action would be ongoing."

Sibley's Group Manager was supposed to review the case file to "ensure that the seizure action is warranted" before giving his approval for seizure and was to consider such factors as the taxpayer's ability to pay based on an analysis of income and expenses, equity in assets and the taxpayer's efforts to resolve the tax liability. Internal Revenue Manual (IRM) 56(12) 1.1-1.4. No one from the IRS asked the Carlsons through their accountant and

Power of Attorney (Hughes) for any documents, analyses or statements. Instead, the decision to seize was made by Revenue Officer Sibley based on his experience with other seizures. (Tr. 1-5, p. 214-215)

The IRS prefers dealing with professionals, so it has a form for the taxpayer to appoint a Power of Attorney (e.g. an accountant). Thus, there is no duty on the part of the taxpayer to "follow-up" since there is a self-imposed duty on the part of the IRS to be dealing with the Power of Attorney (POA) and not the taxpayer.

REASONS THE WRIT SHOULD BE GRANTED
(Argument)

First, it is to be noted that there is no express authority in the Constitution permitting the imposition of penalties and interest as additions to taxes. Rather there are legal fictions, and not very good ones at that.

Perhaps the most preposterous of these fictions occurs in this Court's opinion in Brushaber v. Union Pacific Railroad Company, 240 U.S. 60 L.Ed. 493 (1915). There, in upholding the reach of the 16th (income tax) Amendment this Court said in dicta:

> So far as the due process clause of the 5th Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand a taxing power and taking the same power away on the other, by the limitations of the due process clause. (Citing cases). And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment . . . .

In short, this Court said that the

constitutional taxing power is so all-pervasive that even in the most extreme case of confiscation, the 5th Amendment is powerless to prevent.

With all due respect, this is an argument that an amendment has no effect on what it purports to amend. When the constitution is amended (and most especially in regard to the first ten amendments known as the Bill Of Rights), all therein (before and after) become subject to the constraints of the amendment. In other words, when the 5th Amendment was added, the exercise of all powers became conditional on there being no resulting want of due process. To hold otherwise, is to invite tyranny.

Fortunately, no one has paid much attention to the dicta in Brushaber.

This Court, however, has found little difficulty implying the power to add in-

terest on the basis that the government should be treated as any other creditor[6], but it is obvious that no such "necessary implication" applies to penalties.

The justification for implying the power to add interest rests in the notion that interest is not of a punitive nature, but rather represents compensation for the value of holding money over a period of time. Johnson v. United States, 602 F. 2d 734 (6th Cir. 1979).

On the other hand, penalties are of a punitive nature and it is difficult to see how constitutional authority to levy such penalties can be necessarily implied. The law abhors penalties and they are not

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[6]But the government (IRS) isn't just "any other creditor." The IRS apparently has the power to seize and sell property without trial or judgment and apparently believes its "due" is confiscatory penalties if it does not come first and is not paid immediately, even if the taxpayer must destroy himself in the process.

essential to the collection of taxes.[7]

Moreover, Petitioners submit it is erroneous to say that the bankruptcy court cannot exercise its equitable and statutory powers to abate or nullify a tax penalty. As noted in United States v. Child, 266 U.S. 304, 307, 45 S. Ct. 110 (1924), a tax penalty is "not allowed" under Section 57j of the old Bankruptcy Act. Thus, in that case, the government withdrew its claim for a penalty. It would seem only logical that the Bankruptcy Court[8] would still have the equitable power to abate tax penalties which have accrued through no fault of the Debtor. 11 U.S.C., Section 105(a)

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[7]As we have seen, the IRS is well armed and needs no monetary penalties to terrorize taxpayers into "paying the piper."

[8]Or, the District Court which is the Court In Bankruptcy that refers cases to the bankruptcy court.

specifically gives the bankruptcy court the power "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" [the Bankruptcy Code]. Section 505(a)(1) specifically gives the bankruptcy court the power to determine "the legality" of such a tax.

If this Court, by some stretch, can imply constitutional authorization for necessary tax penalties, then it would appear reasonable and logical to necessarily imply authority in the equitable powers of the district and bankruptcy courts to abate such penalties. Is it not reasonable to say that in abating tax penalties in a proper case, the bankruptcy or district court would be carrying out the broad intent of Congress as expressed in the various equitable provisions of the Bankruptcy Code and Tax Code-- that in

such a case the courts would be fulfilling legislative intent rather than abrogating laws by exceeding their equitable powers? This has to be so, since the power to assess penalties on estimated taxes is restricted by "equity and good conscience," 26 U.S.C., sec 6654(e)(3)(a).

Moreover, as this Court has stated, the IRS will not assess a penalty where it determines that there is "A cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly negatives willful neglect. . . ."

The situation at bar must be distinguished from that in Helvering v. Mitchell, 303 U.S. 391, 58 S. Ct. 630 (1938) wherein this Court upheld a statute which imposed a 50 percent penalty where fraud with intent to evade income taxes was

proven. To hold that Congress had the power to set a Draconian sum certain as penalty for intentionally evading income taxes is one thing (since there can be no question that a civil suit for damages for such a fraud has always arisen under the common law), but it is quite another thing to infer Congressional statutory power to set Draconian penalties to coerce payment of taxes, where there is no intention to evade, no common law to enhance or explain, and where such penalties cannot be paid without imposing extreme hardship on the taxpayer, his family and all who depend upon him.

As stated in United States v. Helvering at 303 U.S. 401: "The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for

the protection of the revenue and to reimburse the Government for the heavy expense of investigating and loss resulting from the taxpayer's fraud. But, as here, where there is admittedly no fraud, there is no need for a safeguard for the protection of the revenue and no possible expense or loss resulting from investigating or pursuing a taxpayer's fraud.

The U.S. Constitution grants to the federal government certain enumerated, but limited, powers. Power is given to tax in two areas: imposts and direct taxes. Constitution, Art. 1, secs. 8 and 9). There is, however, no power granted to the Federal Government to assess additions to taxes in the form of interest and penalties.[9] The two seminal case dealing with the subject by this Court are those

[9]Unless powers are strictly limited, it could threaten the freedom that the constitution protects.

cited above: United States v. Child (interest) and Helvering v. Mitchell (penalties). Perhaps the answer is the obvious one: that the Constitution provides the power to lay and collect taxes, but nothing additional.

As for the preposterous notion that the Internal Revenue Service is not bound by its own guidelines as expressed in its manual and as explained by this Court in United States v. Boyle, 469 U.S. at 264, Petitioners say that any such holding would endorse an insidious fraud -- for the IRS holds itself out as being of assistance to taxpayers based on that Manual.

As stated in the Court of Appeals Opinion 15-16, there is a conflict among circuits as to whether the IRS or the taxpayer bears the ultimate burden of proof when a debtor objects in bankruptcy

to denial or deductions or abatements of their tax bills. The burden of proof shifted to the IRS in this case because Petitioners rebutted the IRS' prima facie claim by the unrebutted testimony of their witnesses. If the IRS felt their case lacked any documents, such as medical reports, they need only have introduced them. As noted above, the IRS never asked for any such documents prior to the filing of bankruptcy from debtors or their accountant (POA), and the medical records of Petitioner's son are attached to the bankruptcy petition. The Court of Appeals opines that Petitioners claim that penalties should be abated because of the IRS' misconduct in violating the automatic stay would be like "awarding a defensive team a touchdown because the offensive team jumped off-side." A 29. But it is the Court of Appeals that has awarded the IRS

an undeserved touchdown, for it also notes at A 15 that the IRS at trial thought it had the ultimate burden of proof. And, of course, so did the Petitioners until the IRS much later trotted out its multifarious legal arguments collected over the years from the many cases it has defended.

The courts below, although they claimed otherwise, simply assigned the Petitioners the ultimate burden of proof (i.e. proof beyond the shadow of a doubt through unassailable documents and expert testimony), erroneously claiming that anything less was not sufficient to overcome the IRS' prima facie claim.

Petitioners requested the Court of Appeals to defer oral argument until further proceedings before the District Court (still pending) were resolved below, but the author of the Court of Appeals

Opinion would brook no delay (so anxious was he to render his opinion). A pity.

It is true, as the Court of Appeals suggests, that at oral argument, Attorney Herbert Carlson did indeed warn that there was a "taxpayer's revolt coming" if the IRS is allowed to run "roughshod" over people like him. The Court of Appeals opinion was written prior to testimony before the Senate Judiciary Committee by persons whose lives had been shattered by the foul collection procedures of the IRS, as endorsed by the courts.[10]

The only significant bottom-line

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[10]The IRS's own employees, testifying behind screens with hoods on and their voices altered by mechanical means, stated that the IRS'deliberate harassment of taxpayers is rampant. Regrettably, it would appear that this Court's "bright-line" as set forth in Boyle, supra, is part of the means used by the IRS to prove the adage that "you can never win against the IRS."

differences between Appellants and one of Senator Orrin Hatch's constituents, for whom the Senator expressed great concern, were the facts that the IRS got to put the constituent out of business by selling all of his assets and sticking him with a tax bill he could never repay in this life. True, the constituent "apparently" did not have a schizophrenic son to occupy his whole attention and cause a deterioration of his business. Nor was he a lawyer who could stand up to the expense of the unlimited legal resources and the vast experience with taxes and the courts that the IRS has at its command. By its collection actions, however, the IRS took away whatever ability Senator Hatch's constituent ever had of paying his tax bill for, as the Court of Appeals opinion here so vividly illustrates, the Secretary of the Treasury, for all intents and pur-

poses, is not going to be "exercising his discretion" to do anything.

While a "tax revolt" may have seemed "melodramatic" to the author of the Court of Appeals Opinion prior to those Senate hearings, we wonder if such a revolt seems quite so far off now.

True, for the moment, in order to save the IRS from the wrath of the American people[11], the Treasury Secretary has, in effect, been forced to relinquish his discretionary powers to a watchdog commission presumably with powers to intervene on behalf of oppressed taxpayers. But powerful forces of many political persuasions are still working hard to eliminate the IRS altogether. We would say that this does indeed constitute a "tax revolt."

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[11]After all, the people are sovereign in this country, not the federal or state governments.

As illustrated here, the American system of tax collection needs to become far less prosecutorial and far more kind.

Apparently, little had changed since the middle ages when the king's forces surrounded the house, dug in the basement for the gold to pay off the latest levy and seized the property, leaving the taxpayer and his family to join Robin Hood and his merry band.

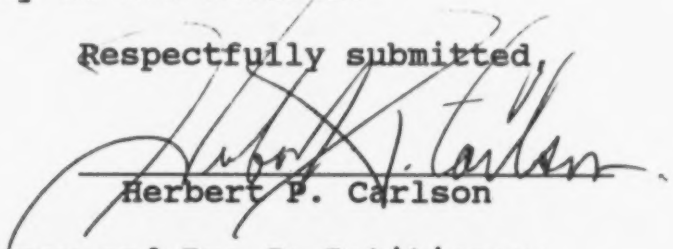
How much better, in this day and age, to afford the distressed taxpayer sufficient time to make order out of chaos so that he can pay his taxes, rather than destroying all possibility of rehabilitation with Draconian interest, penalties, seizures, forfeitures, and forced sales.

The day when the IRS might engender fear and horror in tax payers by setting examples of what happens to people who resist, thus making easy the job of col-

lection (all too often a shakedown), is fast ending.

What the Appellants desired from the IRS was an opportunity to compromise the interest and penalties that had been levied, on the basis of reasonable cause and hardship. What the Appellants desired and expected was the kind consideration promised by IRS District Director Day in her letter of March 30, 1994 (trial exhibit No. 27): "Also, please be assured that we sincerely regret any inconvenience that may have been imposed upon you as a result of any of our actions."

Respectfully submitted,



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CONCLUSION

The Petitioners, Herbert & Margaret Carlson request that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit, and that this Court reverse the Court of Appeals and the courts below with directions to abate and disallow all penalties and interest assessed by the Internal Revenue Service.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2959

IN THE MATTER OF:
HERBERT P. CARLSON and
MARGARET CARLSON,
Debtors.

HERBERT P. CARLSON and
MARGARET P. CARLSON,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 96 C 1660
Suzanne B. Conlon, Judge

ARGUED MAY 27, 1997--DECIDED SEPT. 23 1997

Before ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Herbert Carlson, a lawyer with his own office in downtown Chicago, reported adjusted gross income of $765,433 on his federal tax returns for 1990-1992. His taxable income for the three years was reported to be $493,424 with tax due of $153,824. But Carlson

didn't pony up with even a red cent, so the IRS got on his tail, adding interest and penalties to his tax tab. Now, on this appeal from the district court (which affirmed a decision of the bankruptcy court), he warns us that there will be "a taxpayers' revolt coming" if the IRS is allowed to run "roughshod" over people like him. Although that may be a bit melodramatic, we can only hope he's wrong, for we conclude that he must lose his appeal.

Carlson and his wife Margaret filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code in February of 1994. The IRS filed a proof of claim for the unpaid taxes plus penalties and interest. This appeal stems from the allowance, over the Carlson's objections, of the majority of the IRS' Second Amended Proof of Claim.

Margaret Carlson is not employed, but Herbert, as we noted, made a fair amount of money practicing law in downtown Chicago. And they lived in a home commensurate with Mr. Carlson's income: a $1 million condominium on North Lake Shore Drive (ironically, for a tax case, the address is 1040) in Chicago. The property, subject to a $425,000 mortgage, is held in an Illinois land trust and titled in the name of the trustee. Due to the Carlsons continued failure to pay up, the IRS filed tax lien notices against the Lake Shore property on December 16, 1992, December 13, 1993, and February 9, 1994 . On February 9, the IRS also seized the Carlsons' residence, although they continued to reside there because the property was never sold. A federal tax lien duplicating the February 9, 1994, notice was filed by the IRS on April 29, 1994,

but it was released 7 months later in November.

Unbeknownst to the IRS, the Carlsons also owned a house in LaPorte County, Indiana, valued at $125,000. Two days after the IRS seized the Lake Shore Drive condo the Carlsons transferred title of the Indiana property to their son Peter for zero consideration; the warranty deed was recorded on February 15, 1994. A little more than a week later the Carlsons filed their bankruptcy petition. The IRS then filed its claim.

Meanwhile, the Carlsons also failed to pay all of the social security and Medicare taxes (FICA taxes) and federal unemployment taxes (FUTA taxes) due in connection with people who worked at Mr. CArlson's law office. In February 1995 the IRS notified Mr. Carlson that his 1993 and 1994 returns regarding FICA and FUTA

taxes were selected for audit. In the bankruptcy court the IRS amended its proof of claim twice, adding unsecured priority claims stemming from unpaid FICA and FUTA taxes for 1992 and 1993 and unsecured general claims for related interest and penalties.

According to Mr. Carlson, the sole reasons he and his wife did not pay their 1990-1992 tax bills was the financial and mental strain caused by the medical condition of their youngest son, who apparently is a manic depressive schizophrenic.

The Carlsons eventually paid their tax bills for the 3 years in question. They refused, however,, to pay the accrued interest and penalties and the FICA and FUTA assessments. On December 5, 1995, the bankruptcy court held that the IRS' secured claim for interest and penalties was valid and that, with some exceptions

relating to attorneys at Mr. Carlson's firm, the FICA and FUTA tax claims were valid as well. On appeal by the Carlsons, the district court affirmed the bankruptcy court's decision in all respects. The Carlsons, with Mr. Carlson himself at the wheel, appeal that decision. Having reviewed the bankruptcy court's findings of fact for clear error and the conclusions of law, by the district court, de novo, In re Love, 957 F. 2d 1350, 1354 (7th Cir. 1992); Fed. R. Bankr. P. 8013, we affirm.[1]

Pursuant to 25 U.S.C. sec. 6601(a),

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[1]As a preliminary matter, the Carlsons currently have pending a motion to strike concerning a letter to this Court filed by the Department of Justice on May 8, 1997. The majority of the letter is an explanation and apology by the government counsel for including in her brief two misleading characterizations of testimony, but the Carlsons are correct that the letter also contains impermissible argument on whether the record supports the district court's decision. For that reason, we grant the motion and strike the letter.

the IRS assessed interest on the Carlsons' unpaid tax liabilities. Section 6601(a) states:

> [i]f any amount of tax imposed by this title ... is not paid on or before the last date prescribed for payment, interest on such amount ... shall be paid for the period from such last date to the date paid.

The Carlsons argue that despite the mandatory language of sec. 6601(a) the bankruptcy court had the power, pursuant to 11 U.S.C. secs. 105(a) and 505(a)(1), to abate the interest. Section 105(a) gives the bankruptcy court the authority to issue any order necessary to carry out the provisions of the Bankruptcy Code, and sec. 505(a)(1) provides that

> the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

The Carlsons contend that the bankruptcy

court committed an error law when it held it held it had no equitable power to override the "addition to tax" imposed by sec. 6601(a).

Unfortunately for the Carlsons, the bankruptcy court was correct. Section 505(a) gave the bankruptcy court the power to determine "the amount or legality of the interest assessment. And the Carlsons never asserted that either sec 6601(a) itself or its application to their situation was illegal; they only say it's unfair. They also never argued that the IRS miscalculated the amount of interest due. Section 505(a)(1), therefore, has no application to a situation of this sort. In regard to sec. 105(a), although a bankruptcy court is a court of equity it cannot use its equitable power to circumvent the law. See INS v. Pangilinan, 486 U.S. 875, 883 (1988)

("Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law") (quoting Hedges v. Dixon County, 150 U.S. 182, 192, (1893)). Section 6601(a) states that when taxes are late, interest shall be paid"; the Carlsons' interest assessments were therefore mandatory and proper, accord Johnson v. United States, 602 F. 2d 734, 738-39 (6th Cir. 1994).

The Carlsons add that the bankruptcy court should have invoked the "discretionary exception" of 26 U.S.C. sec. 6404 (e)(1), which allows that Secretary of the Treasury, at his discretion, to abate interest attributable to errors or delays of IRS officers or employees. According to the Carlsons, the IRS is to blame for their failure to pay taxes because its duplicate lien, which took almost 7 months to release, prevented them from obtaining

refinancing on their residence. Besides the fact that the Carlsons neither approached the IRS (as the Secretary's delegate) seeking relief under sec. 6404 (e)(1) nor presented this argument in the bankruptcy court nor showed how they were prejudiced by the April 29, 1994 filing (since it simply duplicated the prior lien), such an abatement by the Secretary is within his sole authority, and as such it is beyond the scope of judicial review. Argabright v. United States, 35 F. 3d 472, 476 (9th Cir. 1994); Bax v. Commissioner, 13 F. 3d 54,58 (2nd Cir. 1993); Selman v. United States, 941 F. 2d 1060, 1064-65 (110th Cir. 1991; Horton Homes, Inc. v. United States, 936 F. 2d 548, 554 (11th Cir. 1991); see P.L. 104-168, Title III sec 301(b), 110 Stat. 1457, codified at 26 U.S.C. sec 6404(g) (requests for abatement made after July 30, 1996, are reviewable

by the Tax Court).

We move next to the penalties assessed against the Carlsons pursuant to 26 U.S.C. sec 6651(a)(2) and 6654(a). The Carlsons advance six theories in their attempt to invalidate the penalties. None of the six, however, are winners.

The Carlsons' most elaborate argument zeros in on a statutorily permitted excuse for not paying up. Penalties are assessed by the IRS when a taxpayer fails to pay income taxes on time "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." 26 U.S.C. sec. 6651 (a)(2). Unless both reasonable cause and a lack of willful neglect are established, imposition of these penalties is mandatory. United States v. Boyle, 469 U.S. 241, 245 (1985). Here it's undisputed that "willful neglect" is not at issue.

In regard to failure to pay estimates on time, penalties are assessed except "to the extent the Secretary determines that by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience." 26 U.S.C. sec. 6654(e)(3)(A). Although a showing of "reasonable cause" is not often accepted as an excuse for a sec. 6654(a) penalty, see Lansdown v. Commissioner, 73 F. 3d 373 (table), 1995 WL 755262 at *4 (10th Cir. 119915) (no reasonable cause exception to sec. 6654); Smith v. Commissioner, 313 F. 2d 724, 737 (8th Cir. 1963) (same); United States v. Steck, 295 F. 2d 682, 685 (10th Cir. 1961) (same); Sawyer v. United States, 426 F. Supp. 572 (W.D. La. 1977) (same), and we are highly doubtful it is, it would be, at least a minimum requirement, see e.g. McIntyre v. Commissioner,

272 F. 2d 188, 189 (6th Cir. 1959); United States v. Mathews, 90-1 U.S.T.C. par. 50,268, 1990 WL 74368 (W.D. Mo. 1990); Roberts Metal Fabrication, Inc. v. United States (In re Roberts), 147 B.R. 965 (Bankr. D. Kan. 1992).

"Reasonable cause" is not defined in the Internal Revenue Code. It is addressed, however, in the Treasury Regulations:

> [F]ailure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship ... if he paid on the due date.

26 C.F.R. sec 301.6651-1(c)(1). In considering whether a taxpayer exercised ordinary business care and prudence, a court should consider all facts and circumstances of the taxpayer's situation, including the amount and nature of expenditures in light of income received prior

to the date payment was due. A taxpayer exercises ordinary business care and prudence "if he ma[kes) reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when it became due." Id. "Undue hardship" means more than mere inconvenience. 26 C.F.R. sec 1.6161-1(b). It must be substantial financial hardship, "for example, loss due to the sale of property at a sacrifice price." Id.

Generally the taxpayer bears the burden of proof when disputing tax liabilities with the IRS. See Helvering v. Taylor, 293 U.S. 507, 515 (1935). In bankruptcy, however, the ultimate burden of proof lies on the claimant. In re Allegheny Int'l, Inc., 954 F. 2d 167 (3rd Cir. 1992); Fullmer v. United States (In re Fullmer), 962 F. 2d 1463 (10th Cir.

1992). The courts of appeals are split on whether the IRS or the taxpayer has the ultimate burden of proof when a debtor objects in bankruptcy to the denial of deductions or abatements of their tax bills. Compare IRS v. Levy (In re Landbank Equity Corp.), 973 F. 2d at 265, 269-71 (4th Cir. 1992) (taxpayer retains burden), with Placid Oil Co. v. IRS (In re Placid Oil Co.), 988 F. 2d 554, 557 (5th Cir. 1993) (IRS bears final burden of proof (which, at trial, the IRS thought it did), in the face of the IRS' claim in bankruptcy the Carlsons nevertheless bore the burden of going forward, which required them to produce something sufficient to defeat the IRS' prima facie case. See Placid Oil, 988 F. 2d at 557 (pursuant to 11 U.S.C. sec. 502 and Fed R. Bank. P. 3001(f), proof of claim is prima facie evidence of validity and amount; burden of going

forward then shifts to objecting party, who must bring forth evidence equal in probative force; only then does burden revert to claimant to prove validity of claim by preponderance of the evidence); Allegheny, 954 F. 2d at 173-74 (same); Fullmer, 962 F. 2d at 1466 (same). According to the bankruptcy court, the Carlsons failed at that task; they did not make a showing sufficient to rebut the penalty portion of the IRS' claim. We find no error in that determination.

The Carlsons provided no evidence that they exercised ordinary care and prudence in regard to their 1990, 1991, and 1992 income taxes. They presented no evidence that they attempted to conserve assets to meet their tax obligations. Paying taxes is one of only two sure things in life, yet the Carlsons allowed their tax liabilities to build over 3

years without taking significant steps to reduce or meet those liabilities. For instance, the Carlsons did not set aside funds out of Mr. Carlson's draw from his firm, make periodic payments when they could, seek financing during those years, or sell their Indiana property, which would have satisfied a large chunk of the IRS' tax bill. Mr. Carlson asserts that his son's medical bills totaled $170,000 over the 3 years in question. This indeed is a huge sum, and it no doubt caused pain--financial and emotional--to the Carlsons, but during the same period Mr. Carlson's taxable income as an attorney was just shy of a half a million dollars. So despite having about $320,000 in tax able income after medical expenses, the record shows no attempt to set aside even a buck for Uncle Sam. As Mr. Carlson said himself, "[I]t's just money that I was

using, I used for other purposes ...." The Carlsons also contend that they sought financing but could not get any as a result of the tax liens. But the first lien popped up in December 1992, 20 months after the first tax deadline passed without payment. Moreover, little evidence showing they were denied credit is in the record. Mr. Carlson testified that borrowing money from a family member was an alternative, but he never even asked the relative for a loan. Mr. Carlson did ask a broker to look into refinancing, but that did not occur until early 1993; not much happened and the Carlsons did not follow up. They gave two persons powers of attorney to deal with the IRS, but again not much happened and the Carlsons did not follow up. The Carlsons erroneously believed that once they hired the broker and gave a power of

attorney, their own responsibility for timely payment dissipated. But reliance on an agent does not constitute "reasonable cause" under sec 6651(a). Boyle, 469 U.S. at 252. That the agents were expected to tend to the matter does not relieve the principals of their duty to comply with tax filing and payment dates. Id. at 250. "Ordinary care and prudence" requires more than mere delegation.

The Carlsons claim that the costs of their son's medical care, together with the mental distress caused by his illness, constituted an undue hardship justifying their failure to pay income taxes and estimates. The authority they present supporting the consideration of illness as reasonable cause comes from Internal Revenue Manual (CCH) sec 4562.2 which lists as possible reason warranting relief "[d]elay ... caused by death or serious

illness of the taxpayer or a death or serious illness in his/her immediate family." Unlike treasury regulations, to which we give deference, Smoot v. United States, 892 F. 2d 597, 601-02 (7th Cir. 1989), the Internal Revenue Manual has no such luster. Noncompliance with the manual does not render an action of the IRS invalid. United States v. Horne, 714 F. 2d 206, 207 (1st Cir. 1983). Procedures in the Internal Revenue Manual are intended to aid in the internal administration of the IRS; they do not confer rights on taxpayers United States v. Mapp, 561 F. 2d 685, 690 (7th Cir. 1977); Horne, 714 F. 2d at 207. We do agree with the Carlsons, though, that financial, mental, and emotional hardship caused by the serious illness of a family member might add up to reasonable cause. See e.g., Boyle, 469 U.S. at 253-255 (Brennan, J.,

concurring) (taxpayer who shows he was unable to file due to physical or mental incapacity might be excused from penalty). We disagree with the Carlsons, however, about whether their particular situation met the reasonable cause standard. According to Mr. Carlson, his son was constantly on medication; was uninsured until 1993, and even now relies on the Carlsons to pay the uncovered balance of his medical expenses; was treated by more than five psychiatrists; lived with the Carlsons in the Lake Shore Drive condominium; is extremely annoying, irritating, and dangerous; physically attached his mother and grandmother; was hospitalized twice; cannot be left alone; stole and pawned jewelry from family members; and generally made the Carlsons' lives "a 'living nightmare.'" The Carlsons assert that their son's condition "is the kind of disruptive

illness that would qualify [as reasonable cause] under any fair application of the rule." Although the situation, if it is really as dreadful as it sounds, is sad, we do not think it constitutes the type of hardship that excuses the payment of taxes. We believe the type of illness or debilitation that might create reasonable cause is one that because of severity or timing makes it virtually impossible for the taxpayer to comply -- things like emergency hospitalization or other incapacity occurring around tax time. The Carlsons presented no medical evidence establishing the nature of their son's illness or its likely effect on those around him. But the best indication that the son's illness did not create an undue mental or emotional hardship is how the Carlsons were able to exercise ordinary care and prudence in regard to many other

matters despite their son's illness -- Mr. Carlson continued to run a profitable law firm, he hired an accountant to prepare and file his returns, he apparently did not default on the $425,000 mortgage, and he continued to pay all of his employees and, for a t least a portion of the time, withhold taxes from their wages. Although Mr. Carlson testified "I wasn't thinking about my taxes. I mean, I was having so much problems, everything just slipped in 1990, '91, and '92 because it was a situation that was totally all consuming[,]" the actual facts show that his son's illness really was not all consuming. See, e.g. Roberts, 147 B.R. at 968 (illness must be "of such a degree as to render the taxpayer physically or mentally incapable of preparing a return or conducting any business activity, and the taxpayer must not even conduct other business"); Akins

v. Commissioner, T.C.M. 1993-256, 65 T.C.M. (CCH)2937, 2939 (1993) ("The fact that [the taxpayer] arranged to have his accountant prepare income tax returns for the years in question indicates to us that his physical and emotional problems did not prevent him from exercising ordinary business care and prudence."), aff'd, 35 F. 3d 577 (11th Cir. 1994) (table). In regard to financial hardship, the Carlsons presented no evidence that their son's medical bills caused catastrophic financial distress -- no documentation was presented of cash flow problems, necessary living expenses, or problems with other creditors. They appear, actually, to have paid all their other household and business bills (the only creditors listed on their bankruptcy petition were the IRS, the Illinois Department of Revenue, and the mortgagee, and when asked at trial if

he paid household expenses during the years in question, Mr. Carlson responded "Sure, sure, of course."). During all this time the Carlsons continued to live in their expensive condominium (in which they had $575,000 in equity) and fully owned a second house valued at $125,000, the sale of which would have made a big dent in their debt to the IRS. Even on their voluntary petition for bankruptcy, the Carlsons listed income per month of $15,000 more than monthly expenses. The bankruptcy court found the Carlsons possessed the resources to pay their income tax liabilities, a finding of fact we do not think erroneous at all, let alone clearly so. The Carlsons' situation doesn't excuse their failure to pay the piper.

The remainder of the Carlsons' reasons for annulling the penalties have

even less merit. They claim the bankruptcy court should have invalidated the penalties because the IRS violated the automatic stay after commencement of their bankruptcy proceeding. Section 362(a) of the Bankruptcy Code imposes a stay on "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. sec 362 (a)(4). Its intended effect is to preserve the status quo as of the date of the bankruptcy proceeding. The Carlsons claim that the IRS violated the automatic stay by filing the tax lien notice of April 29, 1994. It is undisputed, however, that the April 29 notice only duplicated and involved only those claims secured by the notice filed on February 9, 1994. The Carlsons--without authority because there is none--state that all prior liens were either superseded by or merged into the last lien

filed, thus the April 29, 1994, lien violated the stay (and the November 9, 1994, release expunged all liens!). The duplicative April 29 lien notice, though, "create[d], perfect[ed], or enforce[d]" nothing; it could not establish any new rights beyond those already acquired by the February 9 filing, therefore it did not violate the stay at all. Besides the punishment for violating the automatic stay is payment of damages, costs, and fees, not abatement of previously assessed penalties. 11 U.S.C. sec 362(h).

The Carlsons also argue that the stay was violated when the IRS thrice requested information in connection with audits of the 1993 and 1994 employment tax returns. They fail, though, to show how these supposed stay violations, which occurred in February and March 1995 and concerned employment taxes, caused their failure to

pay income taxes by April 15, 1991, 1992, and 1993. Section 6651(a)(2) states in pertinent part: "In case of failure ... to pay the amount shown as tax on any return ... on or before the date prescribed for payment of such tax ... there shall be added to the amount shown as tax on such return [a penalty] ...." Those penalties therefore arose on the day after the taxes were due, not years later when any stay violation occurred. Although the penalty of sec 6654(a) for underpayment of estimated taxes does vary with the length of time the underpayment continues, the Carlsons have never argued that the penalties assessed them should be prorated before and after the supposed stay violations caused by the audit requests, but rather that the audit requests obliterated their responsibility for penalties as a punishment for the IRS' intentional mis-

conduct. That would be a rather absurd result, like awarding a defensive team a touchdown because the offensive team jumped off-side. And in any event, the creation of an automatic stay prohibits the IRS from formally assessing tax liability, attempting to collect, or, again, "creat[ing], perfect[ing]. or enforc[ing]' a lien, 11 U.S.C. sec. 362 (a)(4) and (a)(6), but not from actions like issuing notices of tax deficiency, 11 U.S.C. sec. 362(b)(9), or making audit inquiries to determine the amount of such a deficiency, H & H Beverage Distrib. v. Department of Revenue, 850 F. 2d 165, 167 (3rd Cir. 1988). The IRS, like any other creditor, is entitled to determine whether it possesses a valid claim against a debtor. Id. The audit requests in this case were mere inquiries about deficiencies rather than actions in the nature of as-

sessments, and thus they did not violate the stay.[2]

Next, the Carlsons assert that their penalties should be voided because the trustee title holder and mortgagee were not properly notified, pursuant to 26 U.S.C. sec 6335, of the seizure of their Lake Shore condo. Section 6335(a) requires written notice to the owner of property as soon as practicable after its seizure. Failure to give notice may cause a subsequent forced sale to be invalid, but no sale occurred here, and whether the IRS could have enforced any sale against the unnotified trustee and mortgagee has no bearing on the Carlsons' liability for

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[2]The Bankruptcy Code was amended, effective for cases filed after October 22, 1994, to explicitly allow such IRS audits. See 11 U.S.C. sec 362(b)(9)(A); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, sec 704, 108 Stat. 4106 (1994) Our decision here implies that this amendment was codification of prior law rather than a change in the law.

penalties. Notice of liens or of seizure and sale are elements of the collection procedure rather than a determinant of a taxpayer's liability for penalties. The Carlsons' responsibility for penalties was not quashed by any later omissions by the IRS.

The Carlsons next claim that the IRS could not but a lien on or seize for nonpayment of their personal income taxes real property to which they did not possess title. They think that because the tax liens were filed against them, rather than the title holder, the notices were void. The Carlsons are wrong. A federal tax lien attaches to "all property and rights to property, whether real or personal," belonging to the taxpayer. 26 U.S.C. sec. 6321. Although a beneficial interest in an Illinois land trust is an interest in personal property (even though

the beneficiary retains most of the attributes of real property ownership), People v. Chicago Title and Trust Co., 75 Ill. 2d 479, 488 (1979, the liens did indeed attach to the personal property interest. in addition, in regard to an Illinois land trust, for tax purposes

> true ownership lies with the beneficiaries though title lies with the trustee .... Indeed there is not a single attribute of ownership, except title, which does not rest in the beneficiary....
>
> ....A common-sense definition of "owner" as used in a tax statute must encompass the beneficiary of a land trust, because that beneficiary controls the purchase, sale, rental, management and all other aspects of land ownership.

According to the Carlsons, the IRS failed to notify them of the impending seizure of their condo. This, claim the Carlsons, violated Internal Revenue Manual procedures, thus treating them differently from other taxpayers in violation of the rights to due process and

equal protection. The record, however, shows that an IRS official verbally informed the Carlsons' representative that enforcement action would proceed until the tax liability was paid. Although the officer may not have said explicitly "we're going to seize the property," the Carlsons were on notice that the IRS was moving forward, and a quick look in Mr. Carlson's law books, Title 26 of the United States Code in particular, should have clued them in on what would happen next. And they were, in fact, notified when the actual seizure occurred. Furthermore, as we have noted, noncompliance with the manual does not render an action of the IRS invalid, and the Carlsons have proffered no evidence of any deprivation of property (the residence was never sold) or impermissible basis for discriminatory application of the manual

to their situation. And again, IRS actions in February 1994 have little bearing on penalties the Carlsons first incurred in April 1990, 1991, and 1992.

In sum, the bankruptcy court did not err in allowing the IRS' claim for penalties, and we anticipate no taxpayers' revolt. The heart of this squabble is the Carlsons' outrage at the IRS for not rolling over and accepting their payment plan rather than resorting to permissible statutory collection procedures. According to the Carlsons, "[a]t every turn, the IRS has failed to assist the Debtors as was its responsibility." The IRS has no such responsibility, however, nor any duty to oblige the Carlsons with some payment scheme, let alone a payment plan suggested years after the taxes were

due.[3] Prompt payment of taxes is imperative to the government, and fixed dates are essential to accomplish that result. Boyle, 469 U.S. at 241. Any understandable indignation in this case belongs to any taxpayer who scrapes together enough money or takes out a loan

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[3]Although Mr. Carlson disagrees with this characterization, the record shows he ignored the IRS when it came calling. A revenue officer personally visited Mr. Carlson at the Lake Shore Drive residence in December 1992. Mr. Carlson did not want to talk at that time. Instead Mr. Carlson had his agent contact the IRS to ask for some time to get refinancing. In April 1993 the agent told the IRS he thought the Carlsons had made arrangements to pay the tax bill in full, yet no payment was forthcoming. The agent phoned the IRS in October 1993, stating that the Carlsons were getting financing from a bank and would pay within 30 days, yet that period, too expired without payment or further contact by the Carlsons. Mr. Carlson did not meet with a revenue officer again until after the February 11994 seizure. It's no surprise that by then the IRS was tired of Carlsons' stalling tactics and would not accept their suggested settlement plan.

to meet the annual tax bill, rather than the Carlsons, who say

> Of course, Mr. Carlson ... would not pay exorbitant interest rates to a mortgage company when he felt he would receive reasonable and fair treatment from his own government (that it would abate interest and penalties because of the problems he faced).

Mr. Carlson also failed to pay FICA and FUTA taxes for the secretaries and attorneys who worked for him in 1992 and 1993, claiming they were independent contractors. The bankruptcy court deemed the secretaries to be employees during those years and the attorneys to be employees through the quarter ending March 31, 1993.

The Carlsons' sole argument regarding this determination is that they should not have been required to bring forth "indisputable proof" that the workers were independent contractors rather than employees, "just some proof to shift the

burden." The burden of proof is immaterial at this point, though. The bankruptcy court heard testimony and found that the IRS ultimately proved the workers were employees -- a factual finding which we review only for clear error. We find none: there was more than enough evidence to support the bankruptcy court's decision.

As a last gasp, the Carlsons want the FICA and FUTA taxes eradicated because the IRS' claim regarding the secretaries employment during the second through fourth quarters of 1993 was an estimate. According to the Carlsons, unless the IRS could prove the exact amount due, that portion of the claims must be disallowed. They misstate the law. Title 11 U.S.C. sec 502(c)(1) requires a creditor to estimate the amount of any disputed claim to prevent delay in closing the bankruptcy

estate. The IRS based its estimate on data from prior returns pursuant to 26 U.S.C. sec 6020(b)(1), which authorizes the Secretary of the Treasury to make a return from any available information he can obtain if a taxpayer fails to file. Any return so made is "prima facie good and sufficient for all legal purposes." 26 U.S.C. sec 6020(b)(2). The Carlsons provided no evidence such as accounting information or other business records indicating the IRS' call was off the wall. As a result, the bankruptcy court properly wrapped up the matter on the information it had.

The judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 2, 1997

Before
Hon. Ilana Diamond Rovner, Circuit Judge
Hon, Diane P. Wood, Circuit Judge
Hon. Terence T. Evans, Circuit Judge

IN THE MATTER OF:
HERBERT P. CARLSON and
MARGARET CARLSON,
Debtors.

HERBERT P. CARLSON and
MARGARET P. CARLSON,
Plaintiffs-Appellants,

v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 96 C 1660
Suzanne Conlon, Judge

ORDER

On November 7, 1997, Herbert and Margaret Carlson filed a petition for rehearing with suggestion for rehearing en banc. All judges on the original panel have voted to deny the petition and none of the active judges have requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
HERBERT CARLSON and	)	
MARGARET CARLSON,	)	No. 96 C 1660
	)	
Appellants,	)	Judge
	)	Susan B. Conlon
v.	)	
	)	
INTERNAL REVENUE SERVICE,	)	
	)	
Appellee.	)	

MEMORANDUM OPINION AND ORDER

On February 23, 1994, Herbert and Margaret Carlson filed a voluntary petition for bankruptcy under Chapter 11 of the bankruptcy code. The Internal Revenue Service ("IRS") subsequently filed a proof of claim against the Carlsons for various unpaid taxes, penalties and interest. The Carlsons objected to the IRS's secured claim for interest and penalties on unpaid income taxes for the years 1990 through 1992. The Carlsons also objected to the IRS's secured claim for unpaid social

security taxes ("FICA" taxes") and unsecured priority claims for FICA taxes and federal unemployment taxes ("FUTA taxes"). On February 5, 1995, the bankruptcy court entered judgment against the Carlsons in favor of the IRS on most of the IRS's claim. The Carlsons appeal the bankruptcy court's judgment.

BACKGROUND

Mr. Carlson is an attorney who operates a law office that currently has a support staff and two attorneys working on a case-by-case basis. Mrs. Carlson is not employed. The Carlsons file their tax returns jointly, and reported taxable income in the amount of $148,868 for 1990, $268,910 for 1991 and $75,646 for 1992. The Carlson's personal residence is located on Lake Shore Drive, Chicago, Illinois, and was valued at $1,000,000 (subject to a $425,000 secured claim) on the Schedule A

filed with the bankruptcy court. The property is held in an Illinois Land Trust with the Chicago Title and Trust Company serving as trustee. The beneficial interest has been assigned as security for a loan. Prior to 1994, the Carlsons also owned a house in LaPorte County, Indiana, which was scheduled with a value of $125,000. Memorandum Opinion, No. 94 B 797 *1 (Bankr. N.D. Ill. Dec. 5, 1995) ("the bankruptcy court opinion").

As a result of their failure to pay federal income taxes for 1990, 1991 and 1992, the Carlsons incurred $153,824 in tax liability, plus statutory penalties and interest. The Carlsons also incurred FICA tax liability during this period in connection with employees working at Mr. Carlson's law office. Due to the Carlsons' continuing failure to pay these liabilities, the IRS filed federal tax

lien notices in Cook County, Illinois, on December 16, 1992, December 13, 1993 and February 9, 1994. On February 9, 1994, the IRS seized the Carlsons' residence in Chicago (although the Carlsons continue to reside there because the IRS never sold the property).On February 11, 1994, the Carlsons transferred their Indiana property by warranty deed to their son, Peter Carlson, and on February 15, 1994, the deed was recorded in LaPorte County. On February 23, 1994, the Carlsons filed a voluntary petition under Chapter 11 of the bankruptcy code. The bankruptcy court opinion at 1-2.

After the Carlsons sought bankruptcy protection, the IRS filed a federal tax lien notice duplicating the February 9, 1994 tax lien notice. The duplicate notice was filed on April 29, 1994, apparently due to a defect in the IRS's auto-

mated systems. On November 8, 1994, the IRS a certificate of release that withdrew the April 29 duplicate notice. On February 22, 1995, Mr. Carlson was notified that the form 941 and form 940 tax returns he filed for the years 1993 and 1994 (reating to FICA and FUTA taxes) were selected for audit by the IRS.[1] The bankruptcy court opinion at 2.

After the Carlsons sought bankruptcy protection, the IRS filed a proof of claim against them reflecting the liabilities the IRS had secured by tax lien. On November 14, 1994, and again on March 31, 1995, the IRS filed amended proofs of claim adding unsecured priority claims stemming from unpaid FICA and FUTA taxes for 1992 and 1993. The bankruptcy opinion at 1.

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[1]The bankruptcy court's opinion indicates Mr. Carlson received notice of the audit in 1994, not 1995. This appears to be a typographical error.

The Carlsons objected to the IRS's secured claim for interest and penalties on unpaid income taxes for the years 1990 through 1992. The Carlsons argued these liabilities should be abated because: (1) sec. 505(a) of the bankruptcy code allows the abatement of interest stemming from late taxes; (2) the IRS violated the automatic stay when it filed a duplicate tax lien and made audit requests after the Carlsons filed for bankruptcy; (3) when the IRS seized the Carlsons' Chicago residence, they failed to properly notify the trustee of the Illinois Land Trust that held title to the property and the mortgagee of the property, and they failed to comply with other notice procedures set forth in the Internal Revenue Manual ("IRM); and (4) the Carlsons' payment of medical expenses for their disabled child prevented them from satisfying their

income tax obligations, and therefore constituted reasonable cause for their failure to pay. The Carlsons objected to the FICA and FUTA tax claims on grounds that the IRS wrongly characterized workers at Mr. Carlson's law office as employees rather than independent contractors.

The bankruptcy court entered a memorandum opinion on December 5, 1995, and judgment on February 5, 1996. The bankruptcy court held that the IRS's secured claim for interest and penalties was valid. The bankruptcy court also held that most of the IRS's FICA and FUTA tax claims were valid.

ANALYSIS

I. STANDARD OF REVIEW

The bankruptcy court proceeding was a core proceeding. 28 U.S.C. sec. 157(b)(2)(B). Accordingly, the court reviews the bankruptcy court's findings of fact

under the clearly erroneous standard, and the bankruptcy court's conclusions of law de novo. Fed. R. Bank. P. 8013; In re Ebler Furniture & Appliances, Inc., 804 F. 2d 87, 89 (7th Cir. 1986).

II. SECTIONS 505(a) AND 6404(e)

The IRS assessed interest against the Carlsons under sec. 6601(a) of the tax code for taxes they failed to pay in 1990, 1991, and 1992.[2] The Carlsons argue the bankruptcy court erred when it declined to abate the interest assessed against them pursuant to its powers under sec. 505(a)

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[2]Section 6601 provides in pertinent part:

> If any amount of tax imposed by this title . . . is not paid on or before the last date proscribed for payment, interest on such amount . . . shall be paid for the period from such last date to the date paid.
> 26 U.S.C. sec. 6601(a)

of the bankruptcy code.[3]

The plain language of sec, 6601 mandates an interest assessment on late tax payments. Purcell v. U.S., 1 F. 3d 932, 72 (9th Cir. 1993); In re Cabazon Indian Casino, 57 B.R. 398, 403 (9th Cir. B.A.P. 1986. Section 505(a) does not indicate otherwise. Nor do the bankruptcy court's equitable powers allow it to override the plain mandate of sec. 6601. Paul Revere Life Ins. Co. v. Brock, 28 F. 2d 551, 554 (6th Cir. 1994).

Accordingly, the bankruptcy court did not err when it declined to abate the interest

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[3]Section 505(a) states in pertinent part:

> [T]he court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.
> 11 U.S.C. sec 505(a)(1)

assessed against the Carlsons pursuant to its powers under sec. 505(a).

The Carlsons argue the bankruptcy court erred when it declined to abate the interest against them under sec 6404(e) of the tax code. Section 6404(e) allows the abatement of interest that is attributable to errors or delays by officers or employees of the IRS. The Carlsons contend the IRS is to blame for their late tax payments because the duplicate lien filed by the IRS prevented them from acquiring financing and paying their taxes.

The Carlsons provide no evidence the IRS's duplicate lien prevented them from acquiring financing and paying their taxes to any greater extent than the IRS's prior February 9 lien. Moreover, although sec. 6404(e) provides the IRS with discretion to abate interest attributable to errors or delays of its officers or employees,

the Carlsons have not sought relief under sec. 6404(e) from the IRS, and it is doubtful that an administrative decision by the IRS pursuant to this section is subject to judicial review. Selman v. United States, 941 F. 2d 1060, 1064 (10th Cir. 1991) ("language, structure and legislative history of sec 6404(e)(1) indicates that Congress meant to commit the abatement of interest to the Secretary's discretion" and precludes judicial review); Bax v. Commissioner, 13 F. 3d 54, 58 (2nd Cir. 1993); Horton Homes, Inc. v. United States, 936 F. 2d 548, 551-52 (11th Cir. 1991). Accordingly, the bankruptcy court did not err when it declined to abate the interest assessed against the Carlsons under sec 6404(e).

III. VIOLATIONS OF THE AUTOMATIC STAY

The IRS assessed penalties against the Carlsons under secs 6651(a)(2) and

6654(a) of the tax code for taxes they failed to pay in 1990, 1991, and 1992.[4] The Carlsons contend the bankruptcy court erred when it declined to abate these penalties based on the duplicate lien filed by the IRS. The Carlsons maintain the duplicate lien violated the automatic

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[4]Section 6651(a)(2) states in pertinent part:

> In case of failure . . . to pay the amount shown on any tax return . . . on or before the date proscribed for payment of such tax . . . unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return [a penalty].
> 26 U.S.C. sec. 6651(a)(2).

Section 664(a) states in pertinent part:

> In the case of any underpayment of estimated tax by an individual, there shall be added to the tax . . . an amount determined by applying -- (1) the underpayment rate established under s 6621, (2) to the amount of the underpayment, (3) for the period of the underpayment.
> 26 U.S.C. sec 6654(a)

stay because it was filed after their bankruptcy petition.

Section 362(a)(4) of the bankruptcy code imposes a stay on "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. sec. 362(a)(4). Its intended effect is to preserve the status quo as of the date of the bankruptcy proceeding. The Carlsons provide no legal support for their contention that the duplicate lien violated sec. 362(a)(4) or any other provision of the bankruptcy code. Nor does it appear that the duplicate lien created, perfected, or enforced a lien interest considering that the duplicate lien could not establish any new rights beyond those already acquired by the prior February 9 lien. Accordingly, the bankruptcy court did not err when it denied an abatement of penalties based on the duplicate lien.

The Carlsons contend no lien remained against their property after the duplicate lien was released because the duplicate lien superseded or merged with all prior liens. However, the cases cited in support of this argument have nothing to do with duplicative liens. Accordingly, the Carlsons demonstrate no basis in law for their merger theory.

The Carlsons contend the bankruptcy court erred when it declined to abate the penalties assessed against them based on two audit requests made by the IRS. The audit requests were made on February 22, 1995 and March 10. 1995, and related to unpaid FUTA taxes from 1993 and 1994. The bankruptcy court opinion at 6. The Carlsons maintain the audit requests violated the automatic stay because they were an attempt to gather evidence relating to the status of Mr. Carlson's law office workers

after the Carlsons filed for bankruptcy.

The automatic stay did not prohibit the IRS from issuing a notice of tax deficiency, or a fortiori, engaging in inquiries related to the calculation of deficiency. Sec. 362(b)(9); H&H Beverage Distributors v. Department of Revenue, Commonwealth of Pennsylvania, 850 F. 2d 165, 168-69 (3rd Cir. 1988); see also 1A Collier on Bankruptcy, sec 12.06[2] (15th ed. & Supp. 1995). Rather, the stay only prohibited the formal assessment of a tax liability or the creation of a lien by the IRS. H&H Beverage Distributors, 850 F. 2d 168,-69; In re Ribs-R-Us, Inc., 828 F. 2d 199, 203 (3rd Cir. 1987) ("by filing a petition for reorganization, a debtor obtains a stay of pending and future litigation, including assessment of federal tax liabilities"). The investigation of Mr. Carlson's workers was not a formal assess-

ment of tax liability or the creation of a lien. Rather, it was part of calculating the Carlsons' tax liability for 1993 and 1994. Accordingly the bankruptcy court did not err when it denied an abatement of penalties based on the IRS's audit requests.

IV. FAILURE TO SERVE PROPER NOTICE UNDER SEC. 6335

The Carlsons argue the bankruptcy court erred when it declined to abate the penalties assessed against them because the IRS seized the Carlson's Chicago residence without serving notice of the seizure on the trustee of the Illinois Land Trust that held title to the property and the mortgagee on the property.

This argument misses the mark. Notice of a seizure is an element of the collection procedure mandated by the Internal Revenue Code. 26 U.S.C. sec. 6335. Failure to provide notice may cause a subsequent sale to be invalid. See e.g.

Johnson v. Gartlan, Jr., 334 F. Supp. 438 (E.D. Va. 1971). The Carlsons received actual notice of the seizure. The bankruptcy court opinion at 8. Moreover, although a violation of sec 6335 may invalidate a subsequent sale, the Carlsons provide no authority it is also grounds for an abatement of tax liability. Accordingly, the bankruptcy court did not err when it denied an abatement of penalties based on the IRS's failure to provide proper notice under sec. 6335 to the trustee and mortgagee of the Carlsons' residence.

V. FAILURE TO FOLLOW IRM GUIDELINES

The Carlsons contend the bankruptcy court erred when it declined to abate the penalties assessed against them based on the IRS's failure to comply with IRM procedures for contacting delinquent taxpayers prior to the seizure of their proper-

ty. The Carlsons argue the IRS's failure to follow these procedures violated the United States Constitution.

IRM requirements are merely directory, not mandatory, and noncompliance does not render an action of the IRS invalid. United States v. Horne, 714 F. 2d 206,207 (1st Cir. 1983). Courts have generally held the IRM is not for the protection of taxpayers. Vallone v. Commissions, 88 T.C. 794, 807-08 (1987); see also United States v. Mapp, 561 F., 2d 685, 690 (7th Cir. 1977); United States v. Lockyer, 448 F. 2d 417, 420-21 (10th Cir. 1971); see also United States v. Kaatz, 705 F. 2d 1237, 1243 (10th Cir. 1983) (violation of the [Audit Technique] handbook does not prove a violation of any constitutional right). Accordingly, the bankruptcy court did not err when it denied an abatement based on the IRS's failure to comply with

IRM guidelines.

VI. REASONABLE CAUSE

The Carlsons argue the bankruptcy court erred when it declined to abate the penalties against them based on the their payment of $170,,000 in medical expenses for their disabled child. The Carlsons contend their child's medical expenses prevented them from satisfying their income tax obligations, and therefore demonstrates "reasonable cause" for their failure to pay, and not "willful neglect."

As discussed above, the penalties against the Carlsons were assessed under sec. 6651(a)(2) of the tax code. Section 6651(a)(2) provides that such penalties may be avoided if "it is shown that such failure [to pay] is due to reasonable cause and not due to willful neglect." 26 U.S.C. sec. 6651(a)(2). The Supreme Court has noted "the term 'willful neglect' may

be read as meaning a conscious, intentional failure or reckless indifference ." United States v. Boyle, 469 U.S. 241, 245 (1985). The Treasury department has explained, "[a] failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship if he paid on the due date." Treas. Reg. sec. 301.6651-1 (1991).[5] "A taxpayer will be considered to have exercised ordinary business care and prudence if he made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax lia-

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[5]This interpretation of reasonable cause "merits deference" since it is "consistent with Congress' intent, and over 40 years of case law as well." Boyle, 469 U.S. at 246 n. 4.

bility and nevertheless was unable to pay all or a portion of the tax when it became due." Treas. Reg. secs. 301.6651-1(c)(1) & (2) (1991). "[T]he term 'undue hardship' means more than an inconvenience to the taxpayer. It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer from making payment on the due date of the amount with respect to which the extension is desired." Treas. Reg. sec 1.61611(b) (1991).[6]

Outside the bankruptcy context, the burden of proof rests on the taxpayer in disputes with the IRS over the validity of claims.

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[6]These further refinements of the "reasonable cause" requirement are also entitled to deference because they are reasonable. Goulding v. United States, 957 F. 2d 1420, 1423 (7th Cir. 1992) ("Treasury Regulations are presumptively valid, and the courts defer to them so long as they are reasonable." (citations omitted)).

Helvering v. Taylor, 293 U.S. 507, 515 1935). Within the bankruptcy context, however, the burden of proof lies on the claimant with respect to any claims asserted against the debtor. Fed. R. Bankr. P. 3001(f). As a result, a division currently exists among the Circuits as to whether the IRS or the taxpayer has the ultimate burden of proof when tax claims are objected to in bankruptcy. Some courts have held that the taxpayer retains the same burden of proof he would have assumed outside bankruptcy. See, e.g., In re Landbank Equity Corp., 973 F. 2d 265, 270-71 (4th Cir. 1992); In re Resyn Corp. v. United States, 851 F. 2d 660, 663 (3rd Cir. 1988); In re Uneco, Inc., 532 F. 2d 1204, 1207 (8th Cir. 1976). Other courts have determined that the IRS bears the burden due to its assertion of the claim in the bankruptcy context. See, e.g., California

State Bd. of Equalization v. Official Creditors' Committee, 837 F. 2d 696, 698 (5th Cir. 1988); In re Gran, 964 F. 2d 822, 827 (8th Cir. 1992); In re Federated Dept. Stores, Inc., 135 B.R. 950, 957-58 (Bankr. S.D. Oh. 1992); Internal Revenue Service v. Levy, 130 B.R. 28, 32 (E.D. Va. 1991); In re Dakota Industries, Inc., 131 B. R. 437, 444 (Bankr. D.S.D. 1991). Even when the ultimate burden of proof is placed on the IRS, however, the debtor is required to produce some evidence to shift the burden of going forward. Fidelity Holding Co., Ltd., 837 F. 2d at 698.

The bankruptcy court noted the definitions of willful neglect and reasonable cause discussed above. The bankruptcy court also noted the circuit conflict with respect to the ultimate burden of proof when tax claims are objected to in bankruptcy. The bankruptcy court

then concluded that regardless which party bears the ultimate burden of proof, the Carlsons failed to demonstrate they were entitled to an abatement under sec. 6651 (a)(2). The court reasoned the Carlsons may have shown no willful neglect because Mr. Carlson testified his mind was too preoccupied with his son's disability, as well as the law office and workers he was supporting, to give serious consideration to his tax liabilities or financing alternatives. The court further reasoned the Carlsons made no showing of reasonable cause because they did not present any evidence that they exercised ordinary business care and prudence in providing for payments of their tax liability, or that they would have suffered undue hardship of they had paid their tax liabilities in a timely manner.

The bankruptcy court concluded that

Carlsons were not entitled to an abatement based on their son's medical costs.

The Carlsons contend the bankruptcy court erred because the IRM provides that one reason for relief from penalties is "delay ... caused by death or serious illness of the taxpayer or the death or serious illness in his/her immediate family." Int. Rev. Man. sec. 4562.2 (1988). As discussed above, however, the IRS does not have the force or effect of law, and is not intended for the protection of taxpayers. Vallone, 88 T. C. at 804. Moreover, even if the IRM did have the force of law, the Carlsons presented no concrete evidence their son's illness caused their failure to pay taxes in 1990, 1991 and 1992. Although Mr. Carlson testified to $170,000 in medical expenses during these years, the Carlsons presented no evidence showing the amount

of money remaining for the payment of taxes. Nor did they present any evidence showing that their son's medical bills prevented them from earning income, or prevented them from raising money to pay their tax liabilities. In fact, the record reveals that the Carlsons reported $765,477 of taxable income from 1990 through 1992, and that until December 1992, when the IRS place a lien on the Carlsons' Chicago residence, the Carlsons could have obtained loans to pay their tax liabilities by pledging their real estate as collateral. At the time, the Carlsons' two homes had a fair market value of $1.125 million with only a $425,000 mortgage. The bankruptcy court opinion at 11-12. Moreover, even after the tax lien was filed, there is evidence the Carlsons had loan opportunities available to them. They declined these loans because the

interest rate was unattractive. Trial Transcript at 232.

The Carlsons argue they demonstrated reasonable cause with Mr. Carlson's testimony that he was too preoccupied with his son's disability to pay taxes. As discussed by the bankruptcy court, however, in order to demonstrate reasonable cause a taxpayer must show ordinary business care and prudence in providing for the payment of his or her tax liability, and either an inability to pay or undue hardship that would have resulted from payment. The fact the Mr. Carlson was preoccupied with his son's illness does not show he acted with ordinary care and prudence. Nor does it show the Carlsons could not pay their taxes on time, or would have suffered undue hardship if they had done so. Accordingly, Mr. Carlson's testimony he was preoccupied fails to sat-

isfy the reasonable cause prong of the test for an abatement of penalties under sec 6651(a)(2).

VII. FICA AND FUTA TAXES

Under the Internal Revenue Code, an employer is required to pay one-half of the total FICA taxes assessed against its employees, and withhold from paychecks those FICA taxes owed by the employees themselves. 26 U.S.C. secs. 3101, 3102(a), 3402(a). An employer is also obligated to pay FUTA taxes for its employees. 26 U.S.C. sec 3101. The bankruptcy court held that most of the IRS's FICA and FUTA tax claims against the Carlsons were valid.

The Carlsons argue that some of the IRS's FICA and FUTA tax claims were invalid because they were "estimated claims." The Carlsons conclude the bankruptcy court erred when it allowed these claims. The Carlsons offer no legal

authority for their assertion that a claim is invalid if it is based on an estimate. The Carlsons do not clearly identify the estimated claims they challenge, or provide any evidence showing that these claims are unreliable. Accordingly, the Carlsons fail to persuade the court the bankruptcy court erred with respect to the IRS's FICA and FUTA tax claims.

CONCLUSION

The judgment of the bankruptcy court is affirmed.

ENTER;

Susan B. Conlon
United States District Judge

July 12, 1996

STATUTORY APPENDIX

[Bracketed Material Supplied]

U.S. Constitution, Art. 1, Sec. 8, Powers of Congress:

> "The Congress shall have Power
>
> To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States.
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States or in any Department or Officer thereof."

U.S. Constitution, Art. 1, Sec. 9, Limitations on Powers of Congress:

> "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken"

U.S. Constitution, Amendment V, Due Process:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . . ."

U.S. Constitution, Amendment X, Reserved powers to the states:

> "The powers not delegated to the

United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U.S. Constitution, Amendment XVI, Income tax:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

11 U.S.C., sec. 505(a)(1) [Bankruptcy power to determine legality of interest]:

"Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any ax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction."

26 U.S.C., sec. 6651(a)(2) [Restricted power of the Secretary of Treasury to assess penalties]:

"In case of failure . . . to file any return . . . on the date prescribed therefor . . . unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is

for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate . . . ."

26 U.S.C., sec. 6654(e)(3)(A) [equitable power to abate penalties]:

[Penalties are assessed] "to the extent that by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience." (Bracketed material supplied]

11 U.S.C., sec. 105(a) [bankruptcy equitable powers]:

"The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. . . . "

Internal Revenue Manual (CCH) sec. 4350 (24), par. 22.2 (3):

"A cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly negatives willful neglect will be accepted as reasonable."